IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OBJECTION TO MOTION OF UNITED TRANSPORTATION UNION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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October, 1971

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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Petitioner Norfolk and Western Railway Company objects to the filing of an amicus curiae brief on behalf of the United Transportation Union on the following grounds:

(1) The motion was not timely presented as required by Rule 42(3) of this Court's Rules of Practice.

(2) The motion does not set forth facts or questions of law that have not been adequately presented by the parties, as required by Rule 42(3) of this Court's Rules of Practice.

(3) The brief sought to be filed, to the extent it deals with issues relevant to the resolution of this action, is simply a recital of arguments already made by respond-

ents. The brief also seeks an advisory opinion regarding important questions of federal law which are not raised by the facts of this case, which have no relevance to a decision of this case, and which have not been briefed by the parties.

Objection No. 1

Rule 42(2) permits the filing of an amicus brief only upon consent of the parties or order of Court and indicates that the appropriate time for filing is "within the time allowed for the filing of the brief of the party supported". Rule 42(3) requires that a motion for leave to file be "timely presented". In this context, the requirement of timely presentation must mean that the motion must be filed in time to permit appropriate consideration and a ruling by the Court prior to the due date for the brief of the party supported. In this case, the motion for permission to file an amicus brief was presented on the date that the brief of the party supported was due. Such a procedure clearly does not allow the Court to consider and rule on the motion prior to the proper filing date for the brief. It must be concluded, therefore, that the motion was not timely filed in accordance with the requirement of the Rule.

There can be no excuse for this disregard of appropriate procedure since the UTU has been aware of the pendency of this case since its initiation in the District Court. UTU is, in fact, a party to the District Court action which resulted in the order now under consideration by this Court. The UTU, despite the fact that it was and is a party to this action in the District Court, chose not to participate in any way in the appellate stages of this proceeding until the filing of the present motion. It should not be allowed to appear as a friend of the Court at this late date in violation of the Court's own rule.

The action of the UTU in this regard is particularly objectionable because other railway labor unions wishing to

participate in this proceeding in support of petitioner's position have refrained from doing so in voluntary compliance with the very rule which UTU has chosen to ignore. Shortly after petitioner had filed its brief herein, the representative of an association, consisting of fourteen railway labor organizations, which was instrumental in the negotiation of the protective agreements involved in this proceeding and the protective agreements resulting from many other railroad consolidations, discussed this case with petitioner. This representative expressed the association's view that the petitioner's interpretation of Section 5(2)(f) of the Interstate Commerce Act was correct and that the Court of Appeals' decision would hamper the collective bargaining process in connection with railroad consolidations. This representative also expressed interest in submitting an amicus brief to this effect. Despite the fact that the association had only recently become aware of the present proceeding, the association abandoned the idea of filing an amicus brief because the timeliness requirement of Rule 42 could not be met. Under these circumstances, granting the UTU permission to file its brief would reward a disregard of the requirements of Rule 42 and penalize adherence to the provisions of that rule.

Objection No. 2 and No. 3

Rule 42(3) specifically requires that motion for leave to file "set forth facts or questions of law that have not been . . . adequately . . . presented by the parties. . . ." The motion filed by the UTU makes no attempt to comply with this requirement. While stating in conclusory fashion that it has interests which differ from those of the parties, it does not state what these differences are or whether or not they render the presentation of the issues by the parties inadequate. The majority of the UTU's brief is devoted to a statement of facts and arguments identical to those contained in respondents' brief, couched in phraseology closely

following the phraseology utilized by respondents. The parroting of respondents' arguments in a brief filed on behalf of the UTU serves no useful purpose and will not aid the Court in the resolution of this case.

The portion of the UTU brief which does not duplicate respondents' arguments raises questions as to a union's right to strike to compel an employer to enter into agreements protecting employees from the effects of a railway merger, and whether the procedures of Section 6 of the Railway Labor Act apply to the negotiation of such agreements. These are highly complex issues never before decided by this Court, not raised by the parties to this proceeding, and totally unrelated to the facts surrounding this controversy. The issues in the present case revolve around the jurisdiction of federal courts to construe and invalidate protective agreements previously entered into by labor and management without a strike, the threat of a strike, or the assertion or negation of a right to strike. The case thus involves no question concerning the procedural steps leading to the agreements but only the lawfulness and meaning of the agreements. The new issues raised by the UTU cannot properly be considered or resolved in this context.

Respectfully submitted,

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